**IN THE**
**SUPREME COURT OF THE STATE OF MICHGAN**

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**On Appeal From The Michigan Court of Appeals**
**Murphy, P.J. and Jansen and Cooper, JJ**

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WOLD ARCHITECTS AND ENGINEERS,

Plaintiff-Appellee,

v.

THOMAS STRAT and STRAT AND ASSOCIATES, INC.,

Defendants-Appellants.

/

Supreme Court Docket No. 126917
COA Docket No. 246874

Oakland County Circuit Court
No. 02-044483-CK

# PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

**ORAL ARGUMENT REQUESTED**



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## JURISDICTIONAL STATEMENT

Appellants' brief at page 4 correctly identifies the May 27, 2005 Order of the Michigan Supreme Court granting leave to appeal the June 17, 2004 Judgment of the Court of Appeals. This Court has jurisdiction under MCL 600.215(3); MSA 27A.215(3). See also MCR 7.301(A)(2), MCR 7.302(G)(3).

## STATEMENT OF QUESTIONS INVOLVED

I. Did the trial court err in finding that the Employment/Incentive Compensation Agreement satisfied the requirements of the Michigan Arbitration Act and therefore that Plaintiff/Appellant was not permitted to revoke that agreement?

**The Court of Appeals Answers:** **"Yes"**
**Plaintiff-Appellee Answers:** **"Yes"**
**Defendants-Appellants Answer:** **"No"**

II. Whether common law arbitration should be deemed preempted by the Michigan Arbitration Act, MCL 600.501, et seq.?

**The Court of Appeals Answers:** **(Did not address this issue as it was not raised by Defendants-Appellants at the trial court or before the Court of Appeals)**
**Plaintiff-Appellee Answers:** **"No"**
**Defendants-Appellants Answer:** **"Yes"**

III. Whether the arbitration agreement became a statutory arbitration due to the conduct of the parties during arbitration?

**The Court of Appeals Answers:** **(Did not address this specific question, but rejected Defendants-Appellants' waiver claims)**
**Plaintiff-Appellee Answers:** **"No"**
**Defendants-Appellants Answer:** **"Yes"**

IV. Whether common law arbitration agreements should be unilaterally revocable?

**The Court of Appeals Answers:** **(Did not address this specific question, but did recognize that Michigan common law allows revocation)**
**Plaintiff-Appellee Answers:** **"Yes"**
**Defendants-Appellants Answer:** **"No"**

V. If common law arbitration continues to exist, what language must be included in an agreement to arbitrate to create a statutory arbitration?

**The Court of Appeals Answers:** **(Found that Defendants-Appellants' provision did not comply with statutory language)**
**Plaintiff-Appellee Answers:** **(See discussion below)**
**Defendants-Appellants Answer:** **(See Brief on Appeal)**

VI. Whether the trial court erred in dismissing Plaintiff-Appellee's claims for misrepresentation under the separate Asset Purchase Agreement, which did not contain any arbitration provision?

**The Court of Appeals Answers** **"Yes"**
**Plaintiff-Appellee Answers:** **"Yes"**
**Defendants-Appellants Answer:** **"No"**

VII. Whether the trial court erred by affirming the arbitration award of attorney fees under the Employment/Incentive Compensation Agreement, based on an attorneys' fee provision contained in the separate Security Agreement, where the parties did not agree to arbitrate claims under the Security Agreement and none of the claims arose under the Security Agreement?

**The Court of Appeals Answers:** **(Did not address this issue, given the ruling in favor of Plaintiff-Appellee)**
**Plaintiff-Appellee Answers:** **"Yes"**
**Defendants-Appellants Answer:** **"No"**

## COUNTER-STATEMENT OF FACTS

Defendants-Appellants' ("Strat") "Statement of Substantive Facts" is, in substantial part, argumentative, not supported by the record and should be disregarded. Plaintiff-Appellee ("Wold") offers the following counter-statement.[1]

Wold is an architectural engineering firm headquartered in St. Paul, Minnesota. Thomas Strat is an architect and former principal of Strat & Associates, Inc.

In June 2000, Wold purchased the assets of Strat & Associates pursuant to an Asset Purchase Agreement. The purchase assets included a contract in progress pertaining to the renovation of the Macomb County Courthouse, in Mt. Clemens, Michigan ("Macomb County Project"). Compl., ¶ 7 (Apx 3b). Prior to the purchase date of the assets, Strat represented to Wold that the design and development phases of the Macomb County Project were 100% complete. However, at the time of the acquisition, the design and development phases of the Macomb County Project were not complete, (Apx 4b).

Strat billed 53% of the Macomb County Project before the sale of the assets to Wold. After the sale, Wold discovered that Strat had significantly over-billed the Macomb County

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[1] Strat's arguments, mischaracterized as facts, are replete throughout pages 12 through 14 of its Brief. Examples include: the characterization of negotiations as "long and detailed (Brief at p 12); the unsupported contention that Wold "had a full and complete opportunity to review the state of completion of all Strat work prior to consummating the transaction" (Brief at p 13); Strat's self-serving characterization of the pre-transaction review process and his level of cooperation (Brief at pp 13-14); Strat's argumentative interpretation of Wold's claim (Brief at p 14, fn 8); Strat's characterization of the AAA February 12, 2002 letter sent by a case manager as "giving notice the Commercial Dispute Resolution Procedures would govern" when the letter actually acknowledges that the agreement specifies Labor Arbitration Rules, but the AAA determined (unilaterally) that the case should be "administered" under the Association's Commercial Dispute Resolution procedures . . . (Brief at p 15); Strat's contention that Wold filed a "Counter-Demand" in arbitration "advancing the exact claims it advanced in this subsequent action it filed in the later trial court action." (Brief at p 15).

Project to the client, forcing Wold to complete more of the Macomb County Project with less fee, (Apx 3b-5b).

On June 8, 2000, Wold and Thomas Strat (individually) entered into two agreements that are also relevant to this appeal: (a) the Employment/Incentive Compensation Agreement ("Employment Agreement"); and (b) the Security Agreement. Compl., ¶ 6. Only the Employment Agreement contains an arbitration provision. It states:

> Arbitration. The parties agree to submit any disputes arising from this Agreement to binding arbitration. The arbitrator shall be selected through the mutual cooperation between the representatives or counsel for the respective parties, failing agreement on which may be referred by either party to the Detroit Regional Office of the American Arbitration Association for appointment of an arbitrator and processing under their Voluntary Labor Arbitration Rules.

Thomas Strat filed a demand for arbitration with the American Arbitration Association ("AAA") claiming that he was owed incentive compensation under the Employment Agreement. Wold's Minnesota counsel responded to Thomas Strat's arbitration action by filing a response and an off-set. Wold subsequently retained Michigan counsel to handle the arbitration scheduled to be conducted in Southfield, Michigan. By letter dated August 29, 2002, Wold's counsel notified the AAA that the Employment Agreement does not meet the statutory requirements for enforcement under the Michigan Arbitration Act and that Strat had combined non-arbitrable claims under the Asset Purchase Agreement (Apx 48a-49a).

By letter of September 12, 2002, Wold again advised the AAA that the Employment Agreement does not contain a binding arbitration provision, and objected to Strat's efforts to arbitrate claims under the Asset Purchase Agreement (Apx 50a-52a). Wold then notified the AAA of its decisions to revoke arbitration by letters dated October 8, 2002, and October 11, 2002, (Apx 53a-56a).

Because Strat continued to press forward with the arbitration, Wold filed a Complaint in the Oakland County Circuit Court asking for a declaration that Wold properly revoked the agreement and requesting a preliminary injunction for a stay of the arbitration proceedings. See Motion for Preliminary Injunction as to Arbitration Proceeding and Brief in Support of Motion for Preliminary Injunction on Claim to Declare Arbitration Clause Null and Void, (Apx 10b-85b). The Oakland County Circuit Court denied Wold's request for declaratory relief. In its Opinion and Order of October 22, 2002 (Apx 21a-30a), the circuit court opined:

> Here, the parties' Employment/Incentive Compensation Agreement contains a provision by which the parties agree to submit any disputes to binding arbitration. The provision provides for processing under the AAA's Voluntary Labor Arbitration Rules. As noted by Strat, Rule 50c of the AAA's Voluntary Labor Arbitration Rules provides that parties shall be deemed to have consented that judgment upon an arbitration award may be entered in any federal or state court having jurisdiction thereof. The Court finds that this provision evidences the parties' intent that their arbitration agreement be a statutory arbitration agreement.

(Apx 29a).

The arbitration hearing proceeded on October 21, 2002, through October 24, 2002, over Wold's objections. At all times during those proceedings, Wold made clear to the arbitrator that it had revoked the arbitration, continued to revoke the arbitration, and that the dispute was not appropriately before the arbitrator.

The arbitrator entered an award on November 27, 2002 (Apx 60a). Wold then filed an application in the circuit court to vacate the arbitration award. Wold submitted copies of the AAA Labor Arbitration Rules, the AAA Commercial Dispute Resolution Procedures and an affidavit affirming that the Labor Arbitration Rules are the Voluntary Labor Arbitration Rules with a name change, (Apx 86b-109b). Rule 50c, the provision containing the statutory

arbitration language, is in the Commercial Dispute Resolution Procedures, not the Labor Arbitration Rules (Apx 86b-109b). It is the Labor Arbitration Rules that the parties referenced in the Employment Agreement, not the Commercial Dispute Resolution Procedures.

Wold's Motion and Application to Vacate Arbitration Award was denied by the circuit court on January 15, 2003. Further, the circuit court granted Strat's Motion for Summary Disposition, dismissing not only Wold's claim for declaratory relief, but also its claims for misrepresentation and innocent misrepresentation arising out of the Asset Purchase Agreement (January 15, 2003, Opinion and Order; (Apx 31a-36a).[2]

Wold appealed from the circuit court's February 3, 2003 Order that: (1) denied Wold's application to vacate the November 27, 2002 Award of Arbitrator and (2) dismissed Wold's Complaint against Defendants-Appellees Strat & Associates, Inc., and Thomas Strat. Wold also appealed the October 22, 2002 Order of the lower court that denied Wold's motion for a preliminary injunction on its claim to declare the arbitration clause non-binding.

The Court of Appeals reversed the trial court's orders granting summary disposition in favor of Strat, denying Wold's application to vacate the arbitration award and denying Wold's motion to declare the arbitration clause non-binding. (Court of Appeals Unpublished Opinion; Apx 15a-19a) The Court of Appeals found that the arbitration provision at issue was non-statutory and revocable and remanded for further proceedings consistent with its Opinion.

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[2]The Asset Purchase Agreement contains no arbitration provision, statutory or non-binding. The arbitration provision in the Employment/Incentive Compensation Agreement (which expressly refers to disputes "arising from this Agreement") does not cover disputes arising under the Asset Purchase Agreement. Nonetheless, the lower court dismissed Wold's entire Complaint without mention of the issues of material fact that related to the Asset Purchase Agreement and misrepresentation alleged by Wold.

## SUMMARY OF ARGUMENT

The Michigan Court of Appeals held that "the trial court erred in enforcing a common law arbitration agreement that plaintiff revoked before the announcement of an arbitration award," (Apx 15a-19a). The Court of Appeals recognized that the circuit court mistakenly believed that the parties' arbitration agreement incorporated statutory arbitration language.[3]

The Court of Appeals' decision is mandated by established Michigan common law. As Strat succinctly states: "Irrespective of conduct, current Michigan law permits a party to a non-statutory or common law arbitration agreement to revoke a contract to arbitrate at any time up until the arbitrator(s) render an award—for any reason or for no reason at all."[4]

The arbitration provision at issue is plainly non-statutory and, as such, Michigan law permits either party to revoke at any time before an Arbitrator renders his award. Wold properly exercised its right to revoke—doing so before the Arbitrator rendered his award.

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[3] As will be discussed in further detail, the circuit court based its decision on a mistake of fact: that the American Arbitration Association Voluntary Labor Arbitration Rules contained Rule 50(c), allowing for entry of judgment based on the award. The Employment/ Incentive Compensation Agreement refers to the Voluntary Labor Arbitration Rules, but the error, not recognized by the trial court, is that Rule 50(c) is contained in the AAA Commercial Arbitration Rules, and the Voluntary Labor Arbitration Rules contain no provision for judgment on an award, (Apx 86b-109b).

[4] See Application for Leave to Appeal of Defendants/Appellants at p 2.

In the circuit court, Strat argued that the arbitration provision was statutory because it incorporated American Arbitration Association Rules that refer to entry of a judgment on the award, relying on Hetrick v Friedman, 237 Mich App 264, 269; 602 NW2d 603 (1999). However, the agreement between Wold and Thomas Strat referenced only the Voluntary Labor Arbitration Rules, and those rules do not contain language pertaining to entry or confirmation of an award.

The circuit court mistakenly believed that the arbitration provision contained in the Employment Agreement incorporated Commercial Dispute Arbitration Procedures Rule 50c, which allows for entry of judgment. This led to the trial court's erroneous conclusion that the arbitration provision was statutorily binding.[5] The Court of Appeals recognized and rectified the error: "To remedy any confusion on the part of the trial court, we note that the application of the Procedures [Commercial Dispute Arbitration Procedures] by AAA and the trial court was inappropriate," (Apx 19a).

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[5]This error was first made by the lower court in its October 22, 2002 Opinion and Order denying Wold's motion for a preliminary injunction to block the arbitration, (Apx 21a-30a). The lower court mistakenly concluded that the parties intended a statutory arbitration agreement because "Rule 50c of the AAA Voluntary Labor Arbitration Rules provides that parties shall be deemed to have considered that judgment upon an arbitration award may be entered in any federal or state court having jurisdiction thereof," (Apx 29a). Notwithstanding Wold's efforts to clarify, the error was repeated when the circuit court denied Wold's Motion to Vacate. See January 15, 2003 Opinion and Order, (Apx 34a-35a).

The circuit court further erred in dismissing Wold's two-count Complaint under MCR 2.116(C)(10).[6] While Count I sought a declaration that the arbitration provision in the Employment Agreement with Thomas Strat was not statutory and non-binding, Count II stated a claim for misrepresentation against Strat & Associates, Inc., and Thomas Strat, and Count III stated a claim for Innocent Misrepresentation, (Apx 2b-9b). Counts II and III relate to the sale of assets by Strat & Associates to Wold pursuant to an Asset Purchase Agreement.

In addition, Wold has raised claims under the Asset Purchase Agreement, which contains no arbitration provision whatsoever. The scope of the arbitration provision in the Employment Agreement is limited to disputes "arising from this Agreement." The trial court improperly dismissed Wold's entire Complaint without mention of fact issues pertaining to the Asset Purchase Agreement and misrepresentation claims alleged by Wold.

The circuit court further erred by not at least vacating that portion of the Arbitrator's decision that awarded Thomas Strat attorney fees and costs solely because of an attorneys' fee provision in a separate agreement called the Security Agreement, (Apx 110b-113b). This agreement gives Strat a security interest in accounts receivable to secure Wold's obligations under the Employment/Incentive Compensation Agreement. The Security Agreement provides for reimbursement of reasonable attorneys' fees incurred "in the protection, defense, or enforcement of the Security Interest," (Apx 112b). No action was brought by Strat against the collateral Security Interest (accounts receivable). The Arbitrator exceeded his authority and the circuit court erred in not vacating that portion of the Award.

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[6] Strat's motion brought under MCR 2.116(C)(10) was also defective in that it was not supported by an affidavit, sworn statement or deposition testimony.

## STANDARD OF REVIEW

Questions of statutory interpretation of the Michigan Arbitration Act are reviewed *de novo*. In re MCI TELCOM, 460 Mich 396, 413; 596 NW2d 164 (1999). In construing a statute, the Court's purpose is to ascertain and give effect to the Legislature's intention. Donajkowski v Alpena Power Company, 460 Mich 243, 248; 596 NW2d 574 (1999). Issues pertaining to preemption are questions of law Konynenbelt v Flagstar Bank, 242 Mich App 21, 27; 585 NW2d 300 (2000). Issues pertaining to summary disposition are reviewed *de novo* by the court. Herald Co v Bay City, 463 Mich 111, 117; 614 NW2d 873 (2000). The trial court's decision to enforce, vacate or modify an arbitration award is reviewed *de novo*. Gordon Sel-Way, Inc v Spence Bros, Inc, 438 Mich 488, 496-497; 475 NW2d 704 (1991).

## ARGUMENT

### I. STATUTORY AND COMMON LAW ARBITRATION CO-EXIST AND THERE IS NO BASIS TO CONCLUDE THAT THE MICHIGAN ARBITRATION ACT PREEMPTS

#### A. The Michigan Arbitration Act Does Not Preempt Common Law Arbitration

The Michigan Arbitration Act (MAA), MCL 600.5001; MSA § 27A.5001, et seq., protects the validity of agreements to arbitrate, limits the circumstances under which they can be revoked and provides for enforcement of awards through court judgment. The MAA provides, in part:

> A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which *it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement*, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly

> exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter.

MCL 600.5001(2) (emphasis added).

Michigan law recognizes that arbitration rights are defined by the MAA or common law. Statutory and common law agreements to arbitrate have long co-existed and neither the arbitration statute nor case law support an argument for preemption. M. L. P. 2d, Arbitration § 1 at p 504, citing F J Siller & Co v Hart, 400 Mich 578, 255 NW2d 347 (1977). See also, Frolich v Walbridge Aldinger Co, 236 Mich 435 (1976) (per curium opinion clarifying that, in Michigan, statutory and common law arbitrations co-exist).

While statutory enactments may displace and preempt common law in some circumstances, the MAA is not preemptive. This is evident from the MAA statutory language which describes its coverage limitations.

**1. A Legislative Intent To Abrogate Common Law Should Not Be Presumed**

Strat's argument for preemption is strained and unpersuasive. The statutory language does not demonstrate a legislative intent to abrogate common law arbitration. Michigan law firmly holds that "[l]egislative amendment of the common law is not lightly presumed." Gruskin v Fisher, 70 Mich App 117, 123; 245 NW2d 427 (1976) (citing 3 Sutherland, Statutory Construction, § 61.01, for the principle that "no statute is to be construed as altering the common law, further than its words impart.")

Gruskin illuminates the fallacy of an argument that ignores statutory language. Although a statute may amend the common law, the presumption is that it has no such purpose. A change in the common law must be plainly expressed. Gruskin at 124. The Court

there held that, in the absence of a clear legislative expression to do so, it would not presume that the Summary Proceedings Act amended the long-established common law role that a vendor's notice of forfeiture of a land contract constitutes an election of remedies precluding a subsequent foreclosure and deficiency judgment. Id at 129.

The views on statutory interpretation expressed in Gruskin are widely accepted. In Donajkowski v Alpena Power Company, 460 Mich 243; 596 NW2d 574 (1999), this Court rejected the proposition that the Michigan Civil Rights Act precludes contribution from intentional joint tortfeasors. The Court noted that the primary purpose of statutory interpretation is to ascertain and effectuate legislative intent. When promulgating new laws, the legislature is presumed to be familiar with the rules of statutory construction and existing laws on the same subject and the language of the statute should be read in light of previously established rules of common law. Because well settled common law principles must not be abolished by implication, an ambiguous statute that contravenes common law should be interpreted to make the least change in the common law. Id. at 248, 256.

The Michigan Supreme Court has, on other occasions, rejected arguments that statutory changes abrogate common law doctrine where an intent to do so is not clearly expressed by the Legislature. In Nationwide v W. D. E. Electric Company, 454 Mich 489; 563 NW2d 233 (1997), the Court reversed the lower court's application of a 1986 law in derogation of common law principles pertaining to the use of simple interest to reduce present value. Again, the Court noted that statutes in derogation of common law must be strictly construed and will not be extended by implication to abrogate established rules of common law. Where there is doubt, the meaning of the statute is to be given the effect which makes the least rather than the most change in the common law. The court will presume the

legislature is familiar with the principles of statutory construction. Because the legislature did not expressly provide for compound interest, the Court presumed that the legislature intended to maintain the status quo when it changed the statute without expressly providing compound interest would be required; 454 Mich at 494-95.

Similarly, in Rusinek v Schultz, Snyder and Steel Lumber Company, 411 Mich 502; 309 NW2d 163 (1981), at issue was the 1972 No Fault Act, and if it abolished the common law action for loss of consortium. The Court concluded there is nothing in the language of the Act or its legislative purpose that requires this construction. The Court again applied the principle of statutory construction that statutes which abolish the common law should be construed narrowly. Since loss of consortium is well established in the common law, the Court declined to construe the No Fault statute as implicitly repealing the right to consortium recoveries. The Court cited, among other authority, the Michigan Constitution. Const (1963), Art 3, Section 7 provides:

> The common law and the statute laws now in force, not repugnant to this Constitution, shall remain in force until they expire of their own limitations, or changed, amended or repealed.

Id. at 507.

**2. The Provisions Of The MAA Do Not Demonstrate A Legislative Intent To Preempt Common Law Arbitration**

No credible claim of preemption can be sustained without a clear expression in the statutory language. Because no intent to abrogate common law arbitration is discernable in the MAA, Strat does little more than recite the contents of MAA Sections 5001, 5011, 5025 and 5035. But the plain words of those sections do not demonstrate preemption, nor does Strat's limited analysis. In the end, there is nothing that supports Strat's conclusory

contention that "[p]ursuant to the Michigan Arbitration Act, there is but one form of arbitration that survives in Michigan . . ." Strat Brief on Appeal at p 26.

MCL 600.5001 describes the circumstances and the manner by which disputes may be submitted to arbitration. Subsection 1 concerns existing controversies, subsection 2 pertains to controversies "thereafter arising," and subsection 3 identifies types of labor/employment agreements as to which the MAA will have no application.[7] Subsection 1 has no applicability here, because it lays out a process by which persons may, if they choose, submit an existing controversy to arbitration. Subsection 2 spells out what is required to bind parties to a contract who want to submit a "controversy thereafter arising" to arbitration: "such an agreement" (i.e., "in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such an agreement") "shall proceed and the award reached thereby shall be enforced under this chapter." MCL 600.5001(2).

Strat contends that, because MCL 600.5001(1) states that the parties "may" agree that a judgment in any circuit court shall be rendered upon the award, it is merely a permissive option. Under Strat's inventive interpretation, parties may *or may not* choose to provide in their agreement that a judgment of any circuit court may be rendered on the award, but in either event, the agreement to arbitrate complies with MAA requirements.

Strat's argument fails for several reasons. First, the section relevant to this appeal is MCL 600.5001(**2**), as that subsection pertains to written contracts to settle by arbitration a

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[7] The MAA's distinction between "existing" disputes and disputes "thereafter arising" is not uncommon. See, 4 Am Jur 2d, Alternative Dispute Resolution, § 70, p 129: "Arbitration agreements fall into two principal classifications: (1) agreements to submit a present controversy to arbitration including all or a portion of the issues in actions then pending before the courts; and (2) agreements to arbitrate future controversies."

controversy thereafter arising. In subsection 2, it is stated: "and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such an agreement shall be valid, enforceable and irrevocable. . . ." This is plainly a requirement, not an option.

Strat's argument ignores fundamental rules of statutory construction. The critical statutory words "and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such an agreement," may not be treated as a superfluous legislative expression.

Rules of construction, applicable here, provide: "When construing a statute, a court should presume that every word has some meaning." See Gibson v Nellis, 227 Mich App 187; 575 NW2d 313 (1997), citing Tiger Stadium Fan Club v Government, 217 Mich App 439; 553 NW2d 7 (1996). Further, "[a] construction rendering some part nugatory or surplusage should be avoided." In Gibson, the court reasoned that if the articles of the Boca Code applied to all buildings, then the exception for existing uses would have no purpose apart from allowing the continuation of existing uses that were not addressed by the Code at all. Such an interpretation would render the statute essentially meaningless and unreasonable.

The court, in Gibson, also noted that, "deviation from the language in a model act is presumed to be deliberate" (citation omitted), 227 Mich App at 194. This is relevant here because the MAA provision that calls for an arbitration provision to provide that a judgment of any circuit court may be rendered upon the award is not included in the Uniform Arbitration Act. See Uniform Arbitration Act (U.L.A.) § 1.

In Hanson v Mecosta County Road Commissioners, 465 Mich 492; 638 NW2d 396 (2002), the Michigan Supreme Court held that alleged defective highway design is not within

the Road Commission's duty to maintain and repair the highway under the Highway Exception to Governmental Immunity. "Reasonable minds can differ about whether it is sound public policy to so limit a duty imposed on authorities responsible for our roads and highways. However, our function is not to re-determine the legislature's choice or to independently assess what would be most fair or just for best public policy. Our task is to discern the intent of the legislature from the language of the statute in an Act." (citation omitted). Id at 504.

Case law upon which Strat relies does not support preemption here. Strat cites Jackson v PKM Corp, 430 Mich 262; 422 NW2d 657 (1988), for the proposition that common law may be preempted by a statute. There, the court found that the plaintiff's common law action for gross negligence was preempted by the Dram Shop Act's exclusive remedy. The legislature chose to omit intoxicated persons as a class protected by the Act. The holding has no application to the issue at hand.

Millross v Plum Hollow Golf Club, 429 Mich 178; 413 NW2d 17 (1987), is cited by Strat for the proposition that "common law may be preempted by a statute," but it lends no support for a contention that common law arbitration agreements should be preempted by the MAA. Millross concerns a suit for negligent furnishing of alcohol where an employee attended a work related function at which he became intoxicated, and on the way home in his automobile, fatally injured a person. The case holds that the Dram Shop Act is the plaintiff's exclusive remedy for the furnishing of alcoholic beverages and that negligence in furnishing alcohol to an employee was not a tort at common law.

Strat seems to misunderstand Jackson and Millross. Strat contends: "Because this Court has identified the Legislative abrogation of common law as a type of 'preemption,' it

follows that a statute can 'preempt' common law claims." Brief on Appeal at p 18. That was not the holdings of Jackson and Millross. The Dram Shop Act did not abrogate common law, it created a new right and preempted any claims that relate to furnishing liquor by a licensee other than under the Dram Shop Act.

Strat also relies on O'Brien v Hazelet & Erdal, 410 Mich 1; 299 NW2d 336, (1980), a case presenting a challenge to the constitutionality of a statute setting a six-year bar date on actions against state-licensed architects or professional engineers. The O'Brien case likewise has no relevance to Strat's position.

### 3. Under Michigan Law, Statutory And Common Law Arbitration Co-Exist As Separate Forms Of Arbitration

Michigan case law, including the principal case on which Strat relies, recognizes that statutory and common law arbitrations co-exist. In Hetrick v Friedman, 237 Mich App 264; 602 NW2d 603 (1999), the Court of Appeals acknowledged that there are two forms of arbitration agreements and that parties that want their arbitration agreement to be a statutory arbitration agreement, and irrevocable except by mutual consent, must evidence that intent by including in their agreement a provision for entry of judgment upon the award by the circuit court. Hetrick, 237 Mich App at 268.

Michigan courts have consistently agreed that an arbitration agreement is statutory only if it includes the statutory language that a circuit court may render judgment on the arbitration award. See Tellkamp v Wolverine Mut Ins Co, 219 Mich App 231, 237; 556 NW2d 504 (1996); and EE Tripp Excavating Contractor, Inc v County of Jackson, 60 Mich App 221, 238; 230 NW2d 556 (1975). "[P]arties that want their arbitration agreement to be a statutory arbitration agreement must 'clearly evidence that intent by contract provision for entry of judgment on the award by the circuit court.'" Hetrick, 237 Mich App at 268, quoting

Tellkamp, 219 Mich App at 231, 237; see also EE Tripp Excavating Contractor, 60 Mich App at 238 ("to avail themselves of the statutory arbitration provisions, parties to a contract must clearly evidence that intent by contract provision for entry of judgment upon the award by a circuit court").

The Michigan Court of Appeals agreed in Hetrick that inclusion of the statutory language is necessary pursuant to Michigan statute. That Court held that language providing that a court could enter an arbitration award was present in the parties' agreement because the parties specifically, on the face of their agreement, incorporated the AAA Medical Malpractice Rules, which contain the necessary statutory language. Hetrick, 237 Mich App at 269. Had the parties not expressly incorporated the AAA Medical Malpractice Rules, and thereby the language that is required to create a statutory arbitration, then the Court could not have found that the parties agreed to statutory arbitration when they entered into the contract.

### 4. If The MAA Preempts Common Law Arbitration, Strat Is Left With An Unenforceable Arbitration Agreement

Even if the MAA preempted common law arbitration, Strat still is left with an unenforceable arbitration agreement because the arbitration provision does not comply with the terms of MCL 600.5001. If it is assumed that the MAA preempts common law arbitration, then it necessarily follows that Strat must look to the MAA. MCL 600.5011 protects from revocation "any agreement or submission made as provided in this chapter." MCL 600.5025 gives the circuit courts jurisdiction to enforce an arbitration agreement and to render judgment on an award, but that jurisdiction is limited to agreements described in MCL 600.5001.

Preemption is not a panacea for Strat because under the MAA the arbitration agreement is not enforceable; the MAA does not give the circuit court jurisdiction to enforce

an award that is not made in compliance with MCL 600.5001. Simply stated, an arbitration agreement must comply with the MAA requirements to be protected and enforceable under the MAA. These requirements are few in number and plain to see. Abrogating common law will not excuse compliance with the MAA.

As explained further in the following section, under MCL 600.5001, agreements to settle by arbitration "a controversy thereafter arising" must be in a "written . . . contract and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement." These words were selected by the Legislature for inclusion, they have meaning and must be given effect. Yet, Strat would like to gloss over these words and ask for enforcement under the MAA of an arbitration agreement that obviously does not come within the scope of the MAA because it does not satisfy the requirements of the MAA.

For Strat, preemption of the MAA is a circular journey. If there is no common law arbitration and only arbitration under the MAA, then only those arbitration agreements that are made as described are enforceable through the circuit courts.

### B. Strat May Not Enjoy The Benefits Of The Michigan Arbitration Act Without Satisfying Its Requirements

"The process of dispute resolution and the procedural advantages of arbitration are the servants of the law governing the issues in dispute, not the reverse." DAIIE v Gavin, 416 Mich 407, 427; 331 NW2d 418 (1982). It is accepted that arbitration is a legitimate means of dispute resolution. But Gavin reminds us that these advantages should not be assigned "the pre-eminence to which substantive legal correctness is entitled." Id.

Strat's derisive reference to Michigan's common law revocation rule notwithstanding, the fact remains that Strat and Wold entered into a contract that did not contain a statutory arbitration clause and, as a consequence, both parties acceded to application of Michigan

common law. Michigan common law afforded Strat and Wold the right at any time, up to an award, to revoke arbitration. In Gavin, as in the case now before this Court, the parties entered into an agreement "securing to each of them the benefits to which they are entitled under the applicable law, including their own agreement." Id.

The law was, or should have been, known to Strat when the Employment Agreement was signed. Moreover, as the party who prepared the agreement and its arbitration provision, Strat cannot credibly claim that he misapprehended its terms.[8]

It is axiomatic that:

> Except where a contrary intention is evident, the parties to a contract . . . are presumed or deemed to have contracted with reference to existing principles of law [which] . . . form part of the contract as fully as if expressly incorporated in the contract. Thus, contractual language must be interpreted in light of existing law, the provisions of which are regarded as implied terms of the contract. . . . This principle applies to the common law in effect in the jurisdiction. . . .

11 Williston on Contracts, 4th Ed., § 30:19 (internal footnotes and citations omitted). *Accord*, 5A Michigan Civil Jurisprudence, Contracts, § 175. Thus, Strat's suggestion that this Court should disregard long established Michigan law regarding the meaning of their contract is tantamount to asking this Court to rewrite the contract, which, of course, this Court may not do.

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[8]The contract and arbitration provision were drafted by Strat (Apx 19a). Strat never claimed that he or his attorney made a mistake and had actually intended to include a statutory, non-revocable arbitration provision. As far as the record is concerned, the parties included in their agreement exactly what they intended—a common law arbitration provision revocable by either party. There is no factual or legal basis to assume or conclude otherwise.

### 1. The Parties Did Not Agree To Conduct A Statutory Arbitration Under The Employment Agreement

Here, the parties did not include in the Employment Agreement a provision that a circuit court may render judgment on an arbitration award. Nor did the Employment Agreement incorporate the AAA Rules which provide for judicial enforcement. The Strat/Wold agreement only allowed for "processing" under the AAA Voluntary Labor Arbitration Rules. The Voluntary Labor Arbitration Rules, but these rules do not provide that a circuit court can render judgment on the arbitration award. The Voluntary Labor Arbitration Rules do not contain the necessary language to create statutory arbitration (Affidavit of Dana M. Millikin with attached Voluntary Labor Arbitration Rules, Apx 86b-109b).[9]

Although it ruled against Wold because of a mistaken understanding, the circuit court agreed that a statutory arbitration provision must include language providing for entry of judgment:

> According to the Court of Appeals' interpretation of the Michigan Arbitration Act (MAA), MCL § 600.5001 *et seq.*, parties that want their arbitration agreement to be a statutory agreement *must "'clearly evidence that intent by a contract provision for entry of judgment upon the award by the circuit court.'"* *Tellkamp* v *Wolverine Mut Ins Co*, 219 Mich App 231, 237; 556 NW2d 504 (1996), quoting *EE Tripp Excavating Contractor, Inc* v *County of Jackson*, 60 Mich App 221, 238; 230 NW2d 556 (1975). *This requirement can be satisfied by the express language of the arbitration agreement, or by reference in the arbitration agreement to arbitration procedures or rules that provide for entry of judgment upon the arbitration award. Hetrick, supra* at 269 (emphasis added).

Opinion and Order, October 22, 2002, at pp 8-9.

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[9] This Affidavit, together with the Voluntary Labor Arbitration Rules, was attached as Exhibit G to Plaintiff's Response to Defendants' Motion for Summary Disposition.

The circuit court's understanding of MAA requirements was correct: In order to create statutory arbitration, parties must include express language that a circuit court may enter judgment upon an arbitration award, or, at least, expressly refer to arbitration rules that include this language.

The circuit court twice found that the parties had not included express language providing for statutory arbitration in the arbitration provision of the Employment Agreement. On this finding, the court was correct. However, the circuit court twice found that the parties had satisfied the statutory requirement by reference in the agreement to arbitration procedures that contain language providing for entry of judgment upon the arbitration award. On this finding, the circuit court erred. The court stated:

> Here, the parties' Employment/Incentive Compensation Agreement contains a provision by which the parties agree to submit any disputes to binding arbitration. The provision provides for processing under the AAA's Voluntary Labor Arbitration Rules. As noted by Strat, Rule 50c of the AAA's Voluntary Labor Arbitration Rules provides that parties shall be deemed to have consented that judgment upon an arbitration award may be entered in any federal or state court having jurisdiction thereof. The Court finds that this provision evidences the parties' intent that their arbitration agreement be a statutory arbitration agreement.

Opinion and Order, October 22, 2002 (Apx 29a).

The circuit court again incorrectly held that the language necessary to create statutory arbitration was incorporated by reference:

> *As noted by Strat, Rule 50c of the AAA's Voluntary Labor Arbitration Rules* provides that parties shall be deemed to have consented that judgment upon an arbitration award may be entered in any federal or state court having jurisdiction thereof. The Court finds that this provision evidences the parties' intent that their arbitration agreement be a statutory arbitration agreement.

> The Court finds that the parties agreed to arbitrate their disputes and that their written agreement created a statutory arbitration obligation. It cannot be disputed that *Rule 50c of AAA Commercial Arbitration Rules* creates a statutory arbitration obligation. There is no genuine issue of material fact that the parties' written agreement incorporates Rule 50c.

Opinion and Order, January 15, 2003 (Apx 35a).

The circuit court's Opinion clearly indicates confusion and mistake. The parties' agreement indeed referenced the Voluntary Labor Arbitration Rules, but the statutory language is not found in those rules. Rule 50c is contained in the Commercial Dispute Resolution Procedures and there is no remotely similar provision in the Voluntary Labor Arbitration Rules.

The Voluntary Labor Arbitration Rules referenced in the parties' agreement are a previous incarnation of the current AAA Labor Arbitration Rules, which has been changed by name only (Apx 86b-109b). The Labor Arbitration Rules do not contain the statutory arbitration language, and therefore the statutory arbitration language cannot be incorporated by reference into the agreement.

### 2. The Language Necessary To Create Statutory Arbitration Is Not Incorporated By Reference By Rule 50c Of The AAA Commercial Dispute Resolution Procedures

The AAA Commercial Dispute Resolution Procedure 50c is not a part of the parties' agreement. The parties' agreement as expressed in the non-statutory, non-binding arbitration provision at issue here does not provide that the AAA Commercial Dispute Resolution Procedures apply.

The circuit court misapplied the Hetrick decision to a differing set of facts as this case. In Hetrick, the court incorporated by reference the language necessary to create statutory arbitration from the AAA Medical Malpractice Rules because the parties' agreement

specifically provided that the AAA Medical Malpractice Rules should be used. Here, the parties specifically referred to the Voluntary Labor Arbitration Rules, which as discussed previously, are now the Labor Arbitration Rules. These rules do not contain the necessary language to create statutory arbitration, and if incorporated into the parties' agreement under Hetrick, the necessary statutory language is still not present.

Further, the parties agreed by contract to arbitrate pursuant to the AAA Voluntary Labor Arbitration Rules, not the AAA Commercial Dispute Resolution Procedures or any other AAA arbitration rules that the AAA may decide best suit this particular case. The Commercial Dispute Resolution Procedures are not referenced in, and not part of the parties' agreement. An administrative action by one of AAA's case managers cannot recreate the parties' agreement. The parties made an agreement on June 8, 2000, that on its face does not create statutory arbitration. A case manager at the AAA, someone not a party to the contract, cannot change the parties' agreement by sending out a letter in 2002.

## II. THE PARTIES CONDUCT DID NOT CREATE A STATUTORY ARBITRATION

The record makes clear that before the arbitration hearing, Wold communicated, through written correspondence, the filing of a Complaint seeking declaratory relief, and the filing of a motion for a preliminary injunction, that it revoked its agreement to arbitrate and would not voluntarily arbitrate Strat's claim. Wold had no choice but to show up at the arbitration hearings to protect its interest after Strat, the American Arbitration Association and the circuit court all failed to give effect to Wold's revocation. Yet, before, during and after the arbitration hearings, Wold continued to assert its opposition to arbitration and its right to revoke. Moreover, regardless of any pre-revocation participation by Wold in the arbitration

process, Wold maintained the right under Michigan law to revoke arbitration at any time before an award issued. Wold did revoke and made this clear to both Strat and to the AAA.

Michigan law provides that either party, regardless of which demands the arbitration, may revoke at *any time before the issuance of an arbitration award.* Hetrick supra, 237 Mich App at 268-69. After counsel for Wold took note that the arbitration provision in the agreement was non-binding, Wold gave notice that the arbitration agreement was non-binding and Wold revoked. Wold first raised the issue that the arbitration was not statutory in its Statement of Claim to the AAA. See Respondent's Response to Claimant's Submission and Statement of Counterclaim/Offset Amounts (Apx 114b-139b). Wold further advised that the Asset Purchase Agreement does not contain an arbitration provision and that claims under the Asset Purchase Agreement are not subject to arbitration. Wold again gave notice to the AAA and Strat that the arbitration provision in the Employment Agreement was not statutory in correspondence dated September 12, 2002, and August 29, 2002, and October 8 and 11, 2002 (Apx 48a-58a).

Wold revoked the pending arbitration to no avail. Each time Wold revoked, the case manager of the AAA merely acknowledged receipt of Wold's letters. The AAA failed to cancel the arbitration and proceedings were held October 21, 2002, through October 24, 2002. Not until Wold filed an action with the circuit court did the AAA finally acknowledge Wold's revocation (Apx 59a).

Here, Wold's conduct does not establish assent to submit to arbitration. Wold's many revocations indicate the opposite. Even assuming that Wold at one time indicated a willingness to arbitrate, Wold revoked the arbitration, which under law it may do at any time until the issuance of an arbitration award.

Wold did not lose its right to revoke because on February 12, 2002, a AAA case manager sent the parties a letter which noted that "the determination has been made that the case should be administered under the Association's Commercial Dispute Resolution Procedures." Again, Michigan case law provides that either party may revoke at any time prior to the issuance of an arbitration award. It is also without legal consequence that Wold's Minnesota counsel filed a response and off-set. Wold could not be estopped at any time from asserting the argument that the arbitration provision is non-binding, when the law allows Wold to revoke at any time prior to the issuance of an arbitration award.

Strat, with no legal authority, overstates the significance of the AAA February 12, 2002 letter. It is a letter sent by a person who performs a clerical function. It noted that "determination has been made that the case shall be administered under the Association's Commercial Dispute Resolution Procedures. . . . The letter contains no suggestion that the AAA intended to, or could, modify the parties agreement, nor change a common law arbitration into a statutory agreement. The Court of Appeals correctly rejected the notion that the AAA could somehow create a statutory arbitration in the absence of an agreement by the parties:

> The parties contracted to be governed by the [Voluntary Labor Arbitration Rules], regardless of whether their application to the current dispute was appropriate or not. The parties expressly prohibited a modification "unless such change or modification is made in writing and signed by both Wold and Strat." As [Voluntary Labor Arbitration Rules] were allegedly improperly referenced in the provision, the trial court, and AAA, should have construed the ambiguity against defendants as the drafters, and honored plaintiff's right to unilaterally revoke the agreement.

(Apx 19a).

The fallacy in Strat's argument that the February 12, 2002 case manager's letter created a statutory arbitration is highlighted by a wishful but erroneous assumption that "if that letter constitutes an agreement to arbitrate, . . . there can be no dispute that the arbitration was statutory is nature." (Strat's Brief on Appeal at p 31). The AAA could not possibly re-write the parties' arbitration agreement two years later.

Neither the AAA case manager, nor anyone at the AAA, were parties to the contract. The AAA case manager cannot change the terms of a contract entered into in 2000, by a unilateral decision in 2002. Moreover, as Strat states, "Irrespective of conduct, current Michigan law permits a party to a non-statutory or common law arbitration agreement to revoke a contract to arbitrate at any time up until the arbitrator(s) render an award." (See Application for Leave to Appeal at p 2.)

Strat's reliance on Ehresman v Bultynck & Co, 203 Mich App 350; 511 NW2d 724 (1994) is misplaced. Ehresman affirmed that as arbitration agreement must be in writing, but not necessarily executed, where the plaintiff had operated under the terms of a written agreement but neglected to sign. Ehresman certainly did not hold that the plaintiff acceded to terms that were not contained in the parties' agreement. Here, the parties entered into a contract with specific terms and signed it. Ehresman also does not hold that a third party, not party to a contract, may unilaterally change the parties' contract from a non-statutory arbitration agreement to a statutory arbitration agreement.

**A. Neither Waiver Nor Estoppel Prevent Wold From Revoking Arbitration**

Strat's contention that Wold should be estopped from revoking arbitration or deemed to have waived that right is not supported by facts or law. It is Strat's contention that Wold is estopped from revoking arbitration (or waived its right to revoke) "given eight months of

conduct that was entirely consistent with the Arbitration at issue here, as framed by the AAA February 12, Letter/Order." Strat's Brief on Appeal at p 33. Strat further contends that this estoppel or waiver applies here as a matter of law.

Michigan law will not give rise to an estoppel claim under the facts here. Under Michigan law: "Equitable estoppel arises when one party has knowingly concealed or falsely represented a material fact, while inducing another's reasonable reliance on that misapprehension, under circumstances where the relying party would suffer prejudice if the representing or concealing party were subsequently to assume a contrary position." Adams v City of Detroit, 232 Mich App 701, 708; 591 NW2d 67 (1998).

To justify the application of estoppel, a party must establish the existence of a false representation or concealment of material fact. See *Mich. Civ. Jur.*, 9 Estoppel, § 19. In Sprague v General Motors Corporation, 133 F3d 388; 39 Fed R Serv 3d 788 (1998), the Court identified the elements of equitable estoppel: (1) conduct or language which amounts to representation of material fact; (2) awareness of the true facts by the party seeking to be estopped; (3) intention that the representation be acted on; (4) that the party asserting estoppel must be unaware of the true facts; and (5) reasonable reliance on the representation to the party's detriment. Id. at 403. Moreover, because estoppel requires justifiable reliance, it cannot be applied to vary the terms of unambiguous agreements. Id. at 404.

There are no facts in this record to indicate that Wold knowingly misrepresented facts or otherwise engaged in conduct calculated to mislead Strat. Likewise, there is no suggestion that Wold through any actions misled Strat as it pertains to the existence of a statutory arbitration. Strat, as well as Wold, could ascertain from its plain language the nature of the arbitration provision and determine for itself what if any revocation rights exist under

Michigan law. That law permits Wold to revoke at any time up to the issuance of an award. Wold never represented to Strat that it would not exercise that right or otherwise mislead Strat.

Strat's contention that Wold waived its right to revoke is likewise unsupported by legal authority. Strat and Wold agree that Michigan law allows parties the right to revoke at any time up to the issuance of an award in the absence of a statutory arbitration agreement. It follows that if this is a common law arbitration, then Wold retained the right to revoke, until issuance of an award. Wold never said that it would give up its right of revocation.

Under Michigan law, a waiver is an intentional relinquishment or abandonment of a known right. Roberts v Mecosta Co Hosp, 466 Mich 57, 64 n4; 642 NW2d 663 (2002). If the conduct of a party does not indicate a clear intention to relinquish a known right, it cannot be deemed a waiver. Waiver cannot be inferred by mere silence. Moore v First Security Security Casualty Co, 224 Mich App 370, 376; 568 NW2d 841 (1997).

Again, nothing in the record that Strat identifies leads to the conclusion that Wold intentionally relinquished its right to revoke arbitration as permitted under Michigan common law. Indeed, Wold acted entirely consistently with its right to revoke prior to the entry of the arbitrator's award. Moreover, it cannot be reasonably said that the February 12, 2002 letter from the AAA indicating that it would apply the Commercial Arbitration Rules led to a knowing waiver by Strat of this right to revocation. That would require Wold to understand that the letter somehow overrode the parties' agreement, incorporated the Commercial Arbitration Rules into that agreement, created a statutory arbitration through incorporation, required Wold to take action in response to the letter and that any delay would result in Wold assenting to a statutory arbitration in waiving its rights to revocation. Of course, there is no

support for such a contention in the record, or any indication whatsoever that Wold knowingly waived any rights that it had.

### B. Strat's Claims of Estoppel And Waiver Are Precluded By Modification And Waiver Provisions

The Employment Agreement addresses the subject of modifications and waivers. Section 6 states as follows:

> Amendment and Waivers. No change or modification of any part of this Agreement, including this paragraph, shall be valid unless such change or modification is made in writing and signed by both Wold and Strat. No waiver of any provision of this Agreement shall be valid unless it is in writing and signed by the party alleged to have waived a right under the Agreement.

(Apx 40a-40b).

Section 11 of this Agreement provides that it "shall be governed by the laws of the State of Michigan." Both provisions bear on Issue 3, addressed in the Court's May 27, 2005 Order Granting Leave to Appeal. When the parties entered into this Agreement, they included a common law arbitration provision. It was not statutory, as it lacks the requisite language under the MAA. As a consequence, as discussed above, the parties effectively agreed that resolution of future disputes through arbitration was revocable by either party until such time as an arbitration award may be rendered.

In Quality Products and Concepts Co v Nagle Precision Inc, 469 Mich 362; 666 NW2d 251 (2003), the Court considered the question of waiver and modification of written contractual provisions. The Court recognized that parties are free to modify or waive terms in their contract where there is mutual assent. Proof of mutual assent to alleged modifications or waivers must meet a heightened standard where the parties' contract includes provisions restricting modifications or waivers. The modification and anti-waiver provisions in the

Strat/Wold Agreement dispels the contention that the arbitration provision morphed into a statutory arbitration agreement. In the absence of a writing that complies with the contract provision governing modification or waivers, clear and convincing evidence of a mutual agreement to modify or waive the contract provision in question is required. Id at p 376.

In the present case, there is no writing whereby Wold and Strat agreed to modify their contract to provide for statutory arbitration. Strat believes that the AAA caused a common law arbitration provision to become statutory when a case manager sent out a February 12, 2002 letter stating that the case would be administered under the Commercial Dispute Resolution Procedures.[10] It cannot, however, reasonably be said that the action of a person who is not a party to the contract created a modification to the agreement between Wold and Strat, nor can it be said that any period of silence by Wold after receipt of the letter is evidence of mutual assent to a contract modification or waiver. Wold did not engage in any conduct inconsistent with the alleged waived right. As stated in Quality Products:

> Any clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restrictive amendment clauses.

469 Mich at 374-75. Here, where there is no mutual assent to an agreement to modify the language of the arbitration provision, or to convert a provision revocable by either party into a non-revocable agreement, there is no basis to conclude that the arbitration agreement in this case became statutory.

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[10] The letter did not invite a response, nor did it indicate that, through the reference to Rules, it could render a common law arbitration agreement into a statutory agreement.

### C. The Revocation Option As To Common Law Arbitration Agreements Should Remain As It Is

The May 27, 2005 Order Granting Leave to Appeal identifies as the fourth issue "whether common law arbitration agreements should be unilaterally revocable. Wold contends that common law arbitration provisions are unilaterally revocable and Michigan law on this matter should remain as it is.

When the Michigan Legislature enacted the MAA, it is presumed that it understood the revocation option allowed by law pertaining to common law arbitrations. The Legislature expressly included in MCL 600.5001 a requirement that a written agreement under the Act provide that " a judgment of any circuit court may be rendered upon the award made pursuant to such agreement." The Legislature could have adopted the language of the Uniform Arbitration Act which does not include this requirement and thereby made subject to the MAA all written agreements providing for arbitration. Having crafted the Arbitration Act in this manner, the Legislature left open the option of parties to create common law arbitration agreements with their associated revocation rights.

Because the Legislature enacted the MAA, creating the existing scheme for arbitrations, it would seem that judicial intervention is neither needed nor warranted. If it is perceived that common law arbitration provisions are a hindrance to resolution of disputes or otherwise disfavored, the Legislature can take appropriate action.

While this Court has the authority to change common law, the authority is exercised with restraint. It would not seem appropriate for this Court to substitute its judgment for that of the Legislature. The Legislature, in enacting the MAA, sought fit to include the requirements found in MCL 600.5001. If the Legislature had intended that arbitration agreements should be non-revocable and that judgments on awards issued by circuit courts

without the prescribed language, it could have easily done so. But it did not and it will undermine the Legislature's role if non-conforming arbitration agreements are deemed statutory.

There is no compelling need to modify longstanding common law. Michigan law has long drawn a distinction between statutory and common law arbitrations. What is required to create a statutory arbitration is not overly formalistic or particularly difficult to achieve. The requirements appear to be well understood by attorneys and there is no evidence to support Strat's assertion that the revocation rule "clogs the courts by permitting parties to escape valid contract obligations." Wold Brief on Appeal at p. 18. The truth is, they are not valid statutory arbitration provisions if they do not comply with the statute. Again, compliance is not onerous and anyone who seeks to have the benefits of the Michigan Arbitration Act only need look at the statutory language to understand its requirements.

**D. Michigan Arbitration Act Language Requirements**

MCL 600.5001 identifies what is required under the MAA to create an enforceable, irrevocable agreement to settle by arbitration controversies "thereafter arising between the parties." It requires a is a written contract "in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement."

Arbitration provisions that meet the statutory requirements of MCL 600.5001 should include language that either literally follows the MAA requirements or substitutes in place of the reference to "any circuit court" an equivalent expression. For example, the AAA publishes model arbitration provisions for commercial use. (Apx 140b-153b) The AAA forms include an agreement that will make subject to arbitration controversies or claims later arising. The AAA recommended form provides:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by American Arbitration Association in accordance with its Commercial [or other] Arbitration Rules [including the Optional R Emergency Measures of Protection], and judgment on the award rendered by the arbitrators) may be entered in any court having jurisdiction thereof. (Apx 142b)

The above model provision appears consistent with MAA requirements.

## III. THE RIGHT TO REVOKE COMMON LAW ARBITRATION AGREEMENTS, IF ABROGATED, OR IF COMMON LAW ARBITRATION IS DEEMED PREEMPTED, SHOULD BE APPLIED PROSPECTIVELY

It is well recognized that to create a statutory arbitration agreement, parties must provide that a judgment by circuit court may be rendered upon an award. This recognition is consistent with the express terms of MCL 600.5001. If the statutory language is not present in the agreement, it is under current Michigan law a common law arbitration provision. A common law arbitration agreement may be revoked at any time up to the issuance of an arbitration award. See e.g., Tony Andrevki, Inc v Sribrule, Inc, 190 Mich App 343, 347-398; 475 NW2d 469 (1991). Strat refers to this as a "fixture of Michigan law" and further states: "irrespective of conduct, current Michigan law permits a party to a non-statutory or common law arbitration agreement to revoke a contract to arbitrate at any time up until the arbitrator(s) render an award – for any reason or for no reason at all. *See* Strat's Application For Leave To Appeal at p 2.

As discussed above, Michigan case law has long recognized that statutory and common law arbitration are coexistent. There is no Michigan case holding that the MAA preempts common law arbitration and the language of the MAA does not provide that the Legislature intended to preempt common law.

If this Court were to now abrogate the common law right to revoke non-statutory arbitration, such a decision would displace existing law. Although the common law revocation rule was criticized in Hetrick, six years have passed since Hetrick was decided, and the right to revoke a common law arbitration remains as Michigan law, as recognized most recently by the Michigan Court of Appeals in this action.

Recently, in Apsey v Memorial Hospital, 2005 Mich App LEXIS 1431, *18-19 (Mich App 2005), the Michigan Court of Appeals provided for prospective application of its ruling in the interest of fairness. The circumstances that gave rise to prospective application in Apsey, are no more compelling than is the case for prospective application if the common law revocation rule is preempted or abrogated.

In Apsey, the Court determined that application of the special certification rule under 600.2002 to medical malpractice "was not clearly foreshadowed." But in Apsey, there was at least clear statutory language to suggest otherwise. The Court in Apsey considered the practice and understanding of the Bar in Michigan. Under that standard, the case for prospective application here, assuming a change, is even more compelling. Unlike the facts in Apsey, there is no suggestion that the distinction between common law arbitration and statutory arbitration and the right to revoke a common law arbitration is an obscure rule or doctrine. Most, if not all, Michigan legal encyclopedias contain extensive discussions on arbitration and discuss the distinctions between common law and statutory arbitration. A person need only look at the annotations and notes of decisions in MCLA 600.5001, et seq.,

for a general understanding of the distinction between statutory and common law arbitration and to recognize that parties retain the right to revoke common law arbitration agreements.[11]

## IV. THE CIRCUIT COURT DISMISSED WOLD'S TWO COUNTS FOR MISREPRESENTATION AND NEGLIGENT OR INNOCENT MISREPRESENTATION ALONG WITH WOLD'S COUNT FOR DECLARATORY RELIEF WITHOUT ADDRESSING THE MERITS

The circuit court improperly granted Strat's Motion for Summary Disposition. Strat's Motion for Summary Disposition sought dismissal related only to Wold's arguments to set aside the arbitration because no statutory arbitration exists. Yet, the circuit court granted summary disposition on Wold's entire Complaint. Wold filed a Complaint for three Counts – one for declaratory relief asking the circuit court to declare that the arbitration provision in the Employment Agreement was not statutory and two Counts for misrepresentation and negligent or innocent misrepresentation relating to a separate contract: the Asset Purchase Agreement. The Asset Purchase Agreement does not contain an arbitration provision and the parties have never agreed to arbitrate disputes arising out of Strat's sale of assets to Wold. The only arbitration agreement between the parties is contained in the Employment Agreement, and that Agreement does not provide for statutory arbitration as indicated above. "A party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." First Option of Chicago v. Kaplan, 514 US 938, 945; 115 S Ct. 1920; 131 L Ed

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[11] While Strat denounced the common law right to revoke as "archaic," he does not attempt any meaningful explanation of its harm. In the introduction to his Argument, Strat claims that the "unilateral revocation rule . . . serves only to perpetuate litigation and needlessly clog the courts by permitting parties to escape valid contract obligations, and bring otherwise arbitral matters back into the courts. See Strat Brief On Appeal at p 18. Strat offers no support for this hyperbole and there is no evidence on the record that parties are incapable of creating valid arbitration provisions that comply with the MAA. If assistance is needed, parties can turn to the American Arbitration Association's model arbitration provisions which provide for judicial entry of an award. See website of the American Arbitration Association.

2d 985 (1995). Arbitration is a matter of contract and a valid agreement must exist for arbitration to be binding. Arrow Overall Supply Co. v Peloquin Enterprises, 414 Mich 95, 99; 323 NW2d 1 (1982). Amtower v Wiliam C Roney & Co, 232 Mich App 226, 234, 590 NW2d 580 (1998) (On Remand).

Even if the circuit court determined that the arbitration provision in the Employment Agreement provided for statutory arbitration and was not revocable, Strat could arbitrate only his claims for incentive pay under the Employment Agreement. Wold's Counts for misrepresentation and negligent or innocent misrepresentation were not based on the Employment Agreement, but arose under the Asset Purchase Agreement.

## V. THE TRIAL COURT ERRED WHEN IT AFFIRMED THE ARBITRATOR'S AWARD OF ATTORNEY FEES

This Court reviews a trial court's decision to enforce, vacate or modify an arbitration award *de novo*. Gordon Sel-Way, 438 Mich at 496-497. MCR 3.602(K)(1)(b) governs this appeal.

> The appropriate standard of review for determining whether arbitrators have exceeded the scope of their authority . . . elucidated the principle that it is the parties' contract which defines and limits their rights and duties and the arbitration clause or agreement which confers upon the arbitrators their authority to act. Since arbitrators derive their authority from the parties' contract and arbitration agreement, they are bound to act within those terms. Stated otherwise, the parties' contract is the law of the case in this context.

Gordon Sel-Way, 438 Mich at 496.

Arbitrators exceed their authority "whenever they act beyond the material terms of the contract from which they primarily draw their authority." Gordon Sel-Way, 438 Mich at 496.

### A. An Arbitrator Exceeds His/Her Powers When He/She Fails To Uphold the Plain Meaning of the Parties' Contract

When reviewing the Arbitrator's Award, "one of the court's functions . . . is to determine whether the [arbitration] award rests upon an error of law of such materiality that it can be said that the arbitrator "exceeded [his] powers." Detroit Auto Inter-Insurance Exchange v Gavin, 416 Mich 407, 433; 331 NW2d 418 (1982). The Arbitrator clearly exceeded his authority when he awarded attorney fees to Strat.

Well settled Michigan law provides that if the contract language is clear and unambiguous, then its meaning is a question of law for the Court to decide. Conagra Inc v Farmers State Bank, 237 Mich App 109, 132; 602 NW2d 390 (1999). Courts are not to create ambiguity where none exists. UAW-GM Human Resource Center v KSL Recreation Corp, 228 Mich App 486, 491; 579 NW2d 411 (1998). "Where the language of a contract is clear and unambiguous, the intent of the parties will be ascertained according to its plain sense and meaning." Haywood v Fowler, 190 Mich App 253, 258; 475 NW2d 458 (1991); see also Amtower v William C Roney & Co, 232 Mich App 226, 234; 590 NW2d 580 (1998). "Courts do not have the right to make a different contract for the parties or to look to extrinsic testimony to determine their intent when the words used by them are clear and unambiguous and have a definite meaning." UAW-GM, 228 Mich App at 491.

In construing the contract, the arbitrator must give meaning to all the terms, so that no part is rendered surplusage or meaningless. Associated Truck Lines v Baer, 346 Mich 106, 110; 77 NW2d 384 (1956). If there are any ambiguities the arbitrator must construe them against the drafter. De Bruyn Produce Co v Romero, 202 Mich App 92, 100; 508 NW2d 150

(1993).[12] An Arbitrator "does not have the right to make a different contract for the parties . . . when the words used by them are clear and unambiguous and have a definite meaning." Sheldon-Seatz, Inc v Coles, 319 Mich 401, 406-407; 29 NW2d 832 (1947).

**B. The Arbitrator Exceeded His Authority When He Awarded Attorney Fees**

Even if the arbitration agreement was statutorily binding, the Arbitrator's Award should be vacated in part because he inappropriately awarded attorney fees.

The Employment Agreement does not provide for attorney fees. Strat's claim for attorney fees and costs was predicated on the Security Agreement. The Security Agreement is a separate agreement. The Arbitrator, however, allowed Strat's claim for attorney fees based on the Security Agreement, which includes a provision for attorney fees. It is undisputed that the Employment Agreement has no provision for attorney fees.

The Security Agreement, upon which the arbitrator relied in awarding Strat attorney fees, is a separate contract between the parties. The Security Agreement does not contain an arbitration provision and the parties never agreed to arbitrate the Security Agreement. Even if the Security Agreement did contain an arbitration provision and was properly before the Arbitrator, the Security Agreement allows attorney fees only for actions on secured property brought under the Security Agreement. The terms of the Security Agreement were not before the Arbitrator.

The Employment Agreement clearly did not contain a provision for attorney fees. The Security Agreement does not contain an arbitration clause, and the attorney fee provision in the Security Agreement applies only to claims brought under the Security Agreement. The

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[12] Strat was represented by counsel when entering into the agreements, but Wold was not.

Arbitrator exceeded his authority when awarding attorney fees to Strat. The Arbitrator's charge was to give effect to the plain language of the Employment/Incentive Compensation Agreement. He failed in this charge by awarding attorney fees, and the circuit court should have vacated the award as a matter of law.

## CONCLUSION

The arbitration provision in the Employment/Incentive Compensation Agreement does not contain the language necessary by statute to create statutory arbitration, and the parties did not incorporate any rules or procedures that provided this language as in Hetrick. It is clear that the parties did not create a statutory arbitration. The Court of Appeals correctly reversed the Circuit Court's Order of Plaintiff's Motion to Vacate Arbitration Award, Defendants' Motion to Modify October 22, 2002 Order and Defendants' Motion for Summary Disposition and Judgment on Arbitration Award.

Respectfully submitted,

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Dated: August 31, 2005

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